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Supreme Court, U.S.
FILED

No. 09- 091317 APR 26 2010

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IN THE

Supreme Court of the United States

ERIK DEHLINGER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does the appellate court err when it refuses to decide the defendant's claim of ineffective assistance of counsel on direct appeal when it is obvious from the record that trial counsel had an actual conflict of interest that adversely affected representation of the defendant?

The Fourth Circuit is in conflict with the Second, Eighth and Tenth Circuits. The Supreme Court should resolve this conflict.

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OPINIONS BELOW

The unpublished decision of the Court of Appeals for the Fourth Circuit dated March 5, 2010, is set forth as Appendix A.

STATEMENT OF THE BASIS FOR JURISDICTION

The Court of Appeals for the Fourth Circuit entered an unpublished *per curiam* opinion on March 5, 2010.

This Court has jurisdiction to review on a writ of certiorari the decision by the Court of Appeals for the Fourth Circuit pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

26 U.S.C. § 7206(1):

> **Fraud and false statements**
>
> Any person who —
>
> (1) Declaration under penalties of perjury
>
> Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter
>
> . . .
>
> shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

STATEMENT OF THE CASE

A. Facts Giving Rise to This Case

Until prison, Petitioner, Dr. Erik Dehlinger, worked as an emergency room doctor at McLeod Hospital in Florence, South Carolina. A fellow physician persuaded Dr. Dehlinger and others to invest in Anderson's Ark and Associates (AAA) programs. AAA was a tax and retirement planning and investment company that operated out of Costa Rica. One of AAA's stated

purposes was to sell audiotapes, books, and seminars describing investment opportunities and tax shelters that would, ostensibly, legally lower income taxes. Investors were to borrow money from the Costa Rican company, La Maquina Blanca, and use it for investment plans. Many of AAA's investors, including Dr. Dehlinger, were cheated in the investment program, which, after criminal convictions of much of the leadership, resulted in an order of restitution of over $22 million to be made to the other investors including Dr. Dehlinger. In truth, AAA was a Ponzi scheme. There were no investment plans and no segregated accounts, just one bank account in Costa Rica that has subsequently disappeared. Dr. Dehlinger lost hundreds of thousands of dollars. "It's been the biggest regret of my life. I put my family and my kids in jeopardy . . . I believed in these people. I trusted them," he testified in trial.

AAA's tax planning centered on the "Tax Magic" program that included the book, "21st Century Tax Strategies and Structures," authored by Tara LaGrand, Collis Redd, and Gary Kuzel. These three authors shared an attorney, Scott Engelhard. LaGrand, a certified public accountant (CPA), was the most frequently mentioned witness at Dr. Dehlinger's trial, although she never testified—a critical fact that Dr. Dehlinger believes caused the jury to find guilt.

In February 2002, AAA assigned Dr. Dehlinger to LaGrand for tax advice and document preparation. He knew her from AAA seminars in Reno in 1999 and Las Vegas in 2000. LaGrand gave Dr. Dehlinger a copy of her book "21st Century Tax", prepared his 2001 tax return—which he was convicted for filing—and amended

his 2000 tax return which he was convicted on. Dr. Dehlinger took tax deductions that LaGrand recommended. LaGrand assured him that all the AAA plans were legal. In fact, after he learned of the arrest of AAA's Richard Marks, his first "expert", Dr. Dehlinger contacted LaGrand with concerns. She assured him that the arrest was not related to the tax programs. Dr. Dehlinger stayed with AAA because of LaGrand. He testified, "In the end, I took Tara LaGrand's advice, and I moved forward."

B. Proceedings in the District Court

Dr. Dehlinger was indicted on August 22, 2006, and charged with one count of Conspiracy to Defraud the United States in violation of 18 U.S.C. § 371, and three counts of Willfully Making and Subscribing to a False Return under 26 U.S.C. § 7206(1). Attorney Engelhard, who also represented LaGrand, Kuzel, and Redd, solicited Dr. Dehlinger and was granted permission to appear for him in January 2007. Engelhard became Dr. Dehlinger's lead counsel. Two subordinate attorneys, local counsel John Ervin, and Robert Stientjes, were also on Defendant's legal team.

Dr. Dehlinger's Indictment referenced "Unindicted Co-Conspirators A and B"—tax preparers for AAA who participated in the tax fraud strategies by preparing fraudulent tax returns for Dr. Dehlinger. LaGrand was Unindicted Co-Conspirator B.[1] LaGrand was unindicted because she had already made a deal with the

1. "Erik Dehlinger signed a false 2001 Form 1040, which was prepared by Unindicted Co-Conspirator B, and filed it with the IRS."

Government, pled guilty on May 10, 2005, and was serving time when Dr. Dehlinger was convicted. LaGrand had pleaded guilty to one count of Aiding and Assisting the Filing of a False Income Tax Return in exchange for other counts against her being dropped.

Defendant presumed, because of Engelhard's relationship with LaGrand, that she would be available to testify on his behalf. She would have testified that her clients, including Dr. Dehlinger, were unaware that the advice AAA was providing was illegal having plead and testified she had no Fifth Amendment ability not to testify. Unbeknownst to Dr. Dehlinger, until it was too late (and to Ervin and Stientjes), Engelhard's representation of LaGrand continued while Engelhard was representing Dr. Dehlinger. Engelhard represented Dr. Dehlinger from January 2007 to January 2008; he undisputedly represented LaGrand at least from December 2004 when he tried her case and 2005, when he signed LaGrand's guilty plea, through December 2007, when Engelhard filed a Fifth Amendment argument for LaGrand in the Government's related *United States v. Moran* case.[2]

Dr. Dehlinger's trial took place in the District of South Carolina in October 2007. Ultimately, neither Redd, LaGrand, nor Kuzel testified in Dr. Dehlinger's trial. But LaGrand testified on the same subject matter in the Government's case against her, *United States v. LaGrand*. And, the testimony of the planners was exculpatory as evidenced by the Morans' trial: the

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2. In its discovery responses, the Government linked the 2004 *Moran* case in which Engelhard represented LaGrand to the counts in this case.

Morans' convictions were reversed, *United States v. Moran*, 493 F.3d 1002 (9th Cir. 2007), and in a later trial they were acquitted. LaGrand also had access to cancelled checks that showed Dr. Dehlinger intended to follow the law and thought the loans he deducted were bonifide; but these were not offered during his trial.

On October 15, 2007, Dr. Dehlinger's jury returned a verdict of guilty on three counts of Willfully Filing False Income Tax Returns.

In 2008, Dr. Dehlinger learned—too late—that LaGrand did not testify because she was still Engelhard's client and he was protecting her. Dr. Dehlinger's new lead counsel, Stanley Monroe, filed an application *pro hac vice*, which was granted on March 20, 2008. On March 28, 2008, Dr. Dehlinger moved to remove Engelhard, but it was too late to timely file a motion for new trial.

On January 29, 2009, Dr. Dehlinger was sentenced to 42 months, and he is currently serving his sentence at FCI Morgantown in West Virginia.

C. Proceedings in the Appellate Court

Defendant appealed his conviction on July 1, 2009, arguing that he was prejudiced by his lead trial counsel's conflict of interest. The Court of Appeals for the Fourth Circuit had jurisdiction over the case pursuant to 18 U.S.C. § 3742 (review of a sentence) and 28 U.S.C. § 1291 (review of a final decision of a U.S. district court). The appellate court heard oral argument on January 29, 2010, and issued its decision on March 5, 2010. (Unpub. Op. of 03/05/10.)

The Court of Appeals held, *per curiam*, that it was not the appropriate court to determine whether Engelhard's concurrent representation of Dr. Dehlinger, LaGrand, and Redd "created an actual conflict that adversely affected his representation of [Dr.] Dehlinger, [but] that the facts and circumstances presented by this record should be evaluated by a district judge acting on an adequate factual record in an orderly post-conviction proceeding." (*Id.* at 10.) It held that Dr. Dehlinger did not conclusively establish the existence of such an actual conflict of interest that would allow it to consider the claim on direct appeal. (*Id.* at 8, 10-11.)

REASONS FOR GRANTING THE PETITION

The Court should grant certiorari because Defendant's trial counsel undisputedly had an actual conflict of interest that adversely affected his representation of Dr. Dehlinger.

1. *Actual conflict/adverse effect*

In *Glasser v. United States*, 315 U.S. 60 (1941), this Court held that where the attorney's "struggle to serve two masters cannot seriously be doubted," *id.* at 75, a determination of "the precise degree of prejudice sustained" in such a situation "is at once difficult and unnecessary," *id.* at 75-76. Glasser's lawyer had been appointed to represent Glasser's co defendant. Prejudice was presumed. The Court concluded: "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial." *Id.* at 76. Subsequently, this Court has

reaffirmed the rule that every criminal defendant has a right under the Sixth Amendment to conflict-free representation by counsel. *See Holloway v. Arkansas*, 435 U.S. 475 (1978).[3] *See also Cuyler v. Sullivan*, 446 U.S. 335 (1980). In *Sullivan*, two lawyers who represented three defendants charged with the same murder in separate trials failed to raise the conflict. The Court ruled that conflicting interests must be shown, and the case was remanded to determine if there had been "an actual conflict of interest adversely affect[ing] his lawyer's performance." *Id.* at 350. When the defendant's attorney has an actual conflict of interest, the attorney "breaches the duty of loyalty, perhaps the most basic of counsel's duties." *Strickland v. Washington*, 466 U.S. 668, 692 (1984). The right to conflict free representation is but one aspect of the Sixth Amendment right to effective assistance of counsel. *Id.* at 686.

The Fourth Circuit Court of Appeals adopted and reiterated the actual conflict/adverse effect test, which focuses on defense counsel's actions when accused of a conflict. When an attorney must account to two masters, that is, when it can be shown the attorney took action on behalf of one master that was not in the interest of the other, an actual, reversible conflict occurs. Once the

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3. The Court in *Holloway* determined that the trial court had a duty to intervene on the apparent conflict. 435 U.S. at 484. There is a necessity for the trial court to make a thorough inquiry into any potential conflict with counsel. *Smith v. Lockhart*, 923 F.2d 1314, 1320 (8th Cir. 1991). In the present case, Engelhard, and the Government, concealed the admitted conflicts from the trial court, so no inquiry did or could take place.

defendant shows that there was "an actual conflict of interest" that "adversely affect[ed] counsel's performance in the defense of the defendant," prejudice to the defendant is presumed. *United States v. Tatum*, 943 F.2d 370, 375 (4th Cir. 1991). *Accord United States v. Nicholson*, 475 F.3d 241, 249 (4th Cir. 2007). Once prejudice is presumed, "there is no need to demonstrate a reasonable probability that, but for the lawyer's conflict of interest, the trial or sentencing outcome would have been different." *Id.* at 249.

In *Nicholson*, a case that parallels the present case, the attorney, Babineau, represented two criminal defendants with conflicting interests, but never informed Nicholson that he was representing the other client, Butts, nor did he seek Nicholson's consent to the representation of both clients during the same time frame. *Id.* at 246. Applying the actual conflict/adverse effect test, the court in *Nicholson* first held, "To establish an actual conflict of interest, Nicholson 'must show that [his] interests diverged with respect to a material factual or legal issue or to a course of action.'" *Id.* at 249 (quoting *Gilbert v. Moore*, 134 F.3d 642, 652 (4th Cir. 1998)). Put differently, the defendant shows an actual conflict if the lawyer must "account to two masters." *Id.* There was an actual conflict of interest because the two clients' interests "were in total opposition to each other during Babineau's simultaneous representation of them." *Id.* at 249-50. At the time of Nicholson's sentencing, Babineau was preparing Butts' appeal. *Id.* at 250. The Court observed that because he was in the position of having to place the interests of one client over the other, he "was thus impaired by an actual conflict of interest." *Id.* at 251. The Court

remanded for a determination whether the actual conflict adversely impacted the attorney's performance in Nicholson's sentencing proceedings. *Id.* at 252. *See* also *United States v. Bowie*, 892 F.2d 1494 (10th Cir. 1990) (holding that remand was necessary to determine whether lawyer's prior representation of government witness[4] in related case created actual conflict that might have foreclosed a strategy in handling witness). Federal law is well settled, therefore, as to how an *actual conflict* is shown.

In *Tatum*, the attorney "enmeshed himself in an active and irreconcilable conflict of interest" when he represented both the defendant and his partner. 943 F.2d at 376. The conflict was manifested by the fact that the attorney "could never fully develop the defense that Tatum relied on the advice of Bernstein & Longest (with which [the partner] was associated) and to attempt to shift responsibility to the firm. Were [the attorney] to do so, he would tend to inculpate his other client." *Id.* *See also id.* at 377 (concluding that the attorney engaged in another irreconcilable conflict by representing the defendant and another partner who was under grand jury investigation, because each client was entitled to share confidential information with the attorney and trust that it would not be used against him); *Rubin*, 292 F.3d at 405 (holding that the attorneys' conflict "tainted and adversely affected" the representation of the defendant by her trial defense team; even when the conflicted attorneys were not in control of the trial

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4. A question that has never been answered is whether LaGrand was cooperating with the Government during Dr. Dehlinger's trial.

strategy, other attorneys on the team were hindered by the conflicted attorneys' presence on the defense team[5]).

When a defendant shows an actual conflict of interest that actually affected the attorney's performance, the defendant need not demonstrate prejudice. *Mickens*, 535 U.S. at 171. In fact, the Fourth Circuit itself is in close conflict with this position with a large minority favoring the Eighth and Tenth Circuit positions.

The comment to Rule 1.7 of the American Bar Association (ABA) Model Rules of Professional Conduct emphasizes that a conflict in concurrent representation requires that representation cease, whether it arises before representation, in which case the attorney must decline, or during representation, in which case the attorney must withdraw. Model Rule 1.7, Cmt. [2], [3]. The *only* exception to this rule of non-representation is if "the lawyer obtains the informed consent of each client under the conditions of paragraph (b)." *Id.*, Cmt. [2]. Informed consent must be in writing. *Id.*, Rule 1.7(b)(4). *See Vinson v. True*, 436 F.3d 412, 417-18 (4th Cir. 2005) (discussing the defendant's waiver of the known conflict of interest, which was made in a sworn and written statement that with full knowledge and understanding the defendant was freely and voluntarily giving his consent to the attorney's continued representation).

The record conclusively shows in this case that Dr. Dehlinger did not sign a waiver of the conflict.

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5. In Dr. Dehlinger's case, it was worse, as the conflict belonged to lead counsel.

2. ***When the record is fully developed and the representation was obviously deficient, or to avoid a miscarriage of justice, the court may decide an ineffective-assistance-of-counsel claim on direct appeal.***

The general rule, reiterated by this Court in *Massaro v. United States*, 538 U.S. 500, 504-05 (2003), is that ineffective-assistance-of-counsel claims generally should be brought under 28 U.S.C. § 2255, not on direct appeal, because the record usually is not fully developed for the purpose of determining this claim. Despite this general rule, however, the court of appeals may decide such a claim on direct appeal when the record is sufficiently developed and representation was obviously defective. The Fourth Circuit Court of Appeals and other courts of appeals have so held. *See United States v. Witherspoon*, 231 F.3d 923 (4th Cir. 2000) (plea reversed for ineffective assistance on direct appeal); *United States v. Poindexter*, 492 F.3d 263 (4th Cir. 2007) (same); *United States v. Stockstill*, 26 F.3d 492 (4th Cir. 1994) (motion for new trial based on newly discovered evidence, i.e., conflict of interest); *United States v. Fisher*, 477 F.2d 300 (4th Cir. 1973) (direct appeal; reversed based on ineffective assistance of counsel). *See also United States v. Rice*, 449 F.3d 887, 897 (8th Cir. 2006) (stating rule that the court may decide an ineffective assistance claim on direct appeal if the record is fully developed showing that the representation was obviously deficient or the ineffectiveness is readily apparent, or to avoid a miscarriage of justice, and deciding the issue because the record was fully developed and because both parties so agreed); *United States v. Gaskin*, 364 F.3d 438, 467-68 (2d Cir. 2004) (stating that even after *Massaro*,

"direct appellate review is not foreclosed" when the record is fully developed and resolution of the Sixth Amendment claim is beyond doubt or is in the interests of justice, and deciding that the case before it was "such a case"); *United States v. Leasure*, 319 F.3d 1092, 1099 (9th Cir. 2003) (concluding the record was sufficiently developed to allow review); *United States v. Davis*, 239 F.3d 283, 285 (2d Cir. 2001) (exercising its discretion to consider the claim of attorney misconduct on direct appeal)

But despite the fact that the record in the present case was sufficiently developed for the appellate court to see that Engelhard's representation was deficient, the Court of Appeals refused to decide the issue on direct appeal. It thus contradicted its own precedents and holdings of other courts of appeal that make clear the exception to the general rule preferring § 2255 attacks on counsel's adequacy. This was error.

3. ***The facts of this case show an actual conflict and an adverse effect.***

a. There was an actual conflict.

At the same time Engelhard represented Dr. Dehlinger, he also represented LaGrand, the confessed criminal and leader of all of the AAA tax preparers, the "brain trust" of AAA. Engelhard refused to put LaGrand on the stand as either a friendly or hostile witness in Dr. Dehlinger's case. This, despite the fact that LaGrand had previously testified in other cases that her clients believed AAA's tax strategies to be lawful—thus combating proof of willfulness on the part of the

defendant investor/taxpayer. The facts that Engelhard prevented LaGrand from testifying to were the same facts that proved exculpatory to the defendants in the related and nearly simultaneous trial and were used effectively to hang the jury in LaGrand's own case.

The record, which was before the Court of Appeals, shows the following. Engelhard represented LaGrand in December 2004 in her trial. Engelhard began representing Dr. Dehlinger in January 2007. On September 20, 2007, on the eve of trial, Dr. Dehlinger and Engelhard discussed using LaGrand to testify, Dr. Dehlinger was still unaware that Engelhard continued to represent LaGrand: "And you still think that Marx and/or LaGrand would be too risky." In an email on October 15, 2007, Engelhard promised Dr. Dehlinger: "I will continue to fight for you on this, Erik." In November and December 2007, Engelhard represented LaGrand in the *Moran* trial, where she pleaded the Fifth Amendment. And, in January 2008, he continued to represent Dr. Dehlinger.

Engelhard *never* disclosed to Dr. Dehlinger the fact that he still represented LaGrand, much less LaGrand's desire to stand behind the Fifth Amendment and her plan to do so in a few short months after Dr. Dehlinger's trial. Engelhard stated under oath December 2, 2007, as LaGrand's attorney, that he had advised her not to testify and to assert her Fifth Amendment rights. The testimony of Engelhard in his August 11, 2008 Declaration is inconsistent with his testimony in his December 2, 2007 Declaration. In the 2008 Declaration he swore he "explained to Dr. Dehlinger that for strategic reasons (outlined below) I did not intend to

call Ms. LaGrand as a defense witness on his behalf. I told Dr. Dehlinger that if he wanted to call Ms. LaGrand as a witness, he should hire other counsel." Yet in 2007 he stated that he would not allow his client Tara LaGrand to testify and waive her Fifth Amendment rights.[6] But Engelhard was not removed from Dr. Dehlinger's case until March 28, 2008.

Engelhard represented LaGrand before, during, and certainly after Dr. Dehlinger's trial-level legal battles

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6. The testimony of Engelhard in his August 11, 2008 Declaration is inconsistent with his testimony in his December 2, 2007 Declaration. In the 2008 Declaration he swore he "explained to Dr. Dehlinger that for strategic reasons (outlined below) I did not intend to call Ms. LaGrand as a defense witness on his behalf. I told Dr. Dehlinger that if he wanted to call Ms. LaGrand as a witness, he should hire other counsel." Yet in 2007 he stated that he would not allow his client Tara LaGrand to testify and waive her Fifth Amendment rights. And again under oath Engelhard declares: "Ms. LaGrand would subject herself to a 'catch-22' situation, wherein no matter how she answered certain questions, they would arguably tend to incriminate her." His reason for not calling any AAA planners for Dr. Dehlinger was because "testimony from one or more AAA planners would have been cumulative."

Engelhard not only contradicted himself, but he also attacked the truthfulness of his client, Redd, and his co-counsel, Stientjes, just as he had called his client, LaGrand, a liar. ("It is arguable that Ms. LaGrand's trial testimony is inconsistent with the statements contained in her plea agreement."). An attorney's duty is to represent his client zealously. Clearly, Engelhard's representation of these clients was disloyal and conflicted, as was his representation of Dr. Dehlinger; but he did succeed in keeping LaGrand off the stand, both in the *Moran* trial and in the *Dehlinger* trial.

(until he was terminated). On the same day he was wearing the hat as Dehlinger's lawyer, while the trial team was wrestling with the decision whether to put LaGrand on the stand, he was also wearing the hat as LaGrand's lawyer trying to keep her off any witness stand. LaGrand's and Dr. Dehlinger's interests had clearly diverged (if they had ever been united); Engelhard was representing two masters.[7]

Engelhard had a conflict, and he knew it. Engelhard admitted that he told Department of Justice attorney Corey Smith (Smith) that he represented LaGrand, Redd, and Kuzel. Smith responded that he could not represent all of them due to conflict and he needed to pick one to represent. Additionally, Redd[8] stated:

> The organization [AAA] assigned Scott J. Engelhard to represent me as my attorney . . . Engelhard asked me to waive conflict so that he could represent . . . Tara LaGrand.

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7. In fact, Engelhard had at least three masters during Dehlinger's trial: Redd, LaGrand, and Dr. Dehlinger. The record shows that Engelhard represented these three individuals simultaneously. And, Engelhard admitted to representing Kuzel, as well. If Engelhard on this record undeniably represented at least three of the AAA planners, did he at any time represent the other four? At the time of Dr. Dehlinger's trial, the Government knew that Engelhard represented at least two, and likely all seven, of the professionally licensed sellers and promoters of the tax scam sold to Dr. Dehlinger that led to Dr. Dehlinger's ruin. The Government did not reveal this to the court.

8. Redd, the co-author of a book with LaGrand, would have been useful to Dehlinger.

> She and I had both been planners for AAA. I told him no . . . I did not believe that he could manage to represent both my best interest and her best interest at the same time. He was persistent.

b. Defendant did not waive the conflict.

The Government (which benefitted from Engelhard's actions as a non-released attorney/ cooperative witness) also argued "waiver." It claimed that Defendant implicitly waived his right to conflict adjudication. The fatal problem with this argument is that there was no waiver for Dr. Dehlinger.

There is not even the slightest hint that Engelhard told Dr. Dehlinger that he would be representing LaGrand in the *Moran* trial in December 2007, let alone evidence that he secured a written waiver or even an oral waiver, although he was still lead counsel of record for Dr. Dehlinger at the time. The record shows that Engelhard solicited, and received, a conflict waiver from LaGrand. It makes sense that LaGrand would waive the conflict. After all, her lawyer, Engelhard, continued to represent her interest even when it was in direct conflict with those of his future and past clients.

Petitioner brought to the Fourth Circuit Court's attention the case of *United States v. Swartz*, 975 F.2d 1042 (4th Cir. 1992), in which the appellate court reversed a conviction on direct appeal based on a conflict. Counsel worked with co-counsel to the benefit of a co-defendant and to the detriment of the appellant. When it came to the co-defendant's sentencing hearing, counsel argued

that he should be treated equally with Swartz, i.e., less harshly, even though Swartz's presentence report and plea agreement showed that she was less culpable than her co-defendant. *Id.* at 1046. "Because her best interests with regard to her own sentencing required that she be portrayed as less culpable and more cooperative than her co defendants, this strategy was inherently damaging to Mrs. Swartz's position." *Id.* A divergence of interests caused an actual conflict where only a potential conflict had existed before. *Id.* at 1048. The conflict adversely affected Swartz. *Id.*

Both of the defendants in *Swartz* had previously executed written waivers of the *potential* conflict of interest. As for whether she had effectively waived the conflict, the court held that the waiver was insufficient to waive the attorney's conflict of interest as it developed at Swartz's and her co-defendant's sentencing hearings; the attorney's strategy "vitiated the waiver made earlier." *Id.* at 1049. "[W]e think it clear," held the court, "that Mrs. Swartz could not have known at the time of her waiver of the serious nature of the conflict of interest that would later develop at her sentencing." *Id.*

c. The actual conflict had an adverse effect on Defendant.

Engelhard's actual conflict had an adverse effect on Dr. Dehlinger's defense options. Dr. Dehlinger was tried and convicted in October 2007. It was not likely at the time he was representing Dr. Dehlinger that Engelhard would require his other client, LaGrand, to testify in support of Dr. Dehlinger to LaGrand's detriment. And,

he didn't. In November and December 2007, when Engelhard represented LaGrand, post trial motions, if any, were to be filed in *Dehlinger*. It was not likely at the time he was representing LaGrand in the *Moran* trial that Engelhard would simultaneously and timely file the necessary motion for new trial on Dr. Dehlinger's behalf, disclosing what he unequivocally had concealed: their continuing relationship. And, he didn't!

Did the conflict adversely affect the lawyer's performance? The question is easily answered in this case by the results in *Moran*, in which similar witnesses were used. There, acquittals resulted—but an acquittal is not the test, only the fair possibility of an acquittal. Redd's testimony was critical to the ultimate acquittal in the *Moran* case.

> Redd testified as a fact witness on behalf of the Morans. I observed Redd provide evidence regarding lack of knowledge and lack of willfulness on the part of the Morans. I now believe that Redd had the potential to be an important fact witness on behalf of Dehlinger. The Morans were acquitted of all sixty-four (64) counts of their indictment. I believe that the testimony of Redd was instrumental in the acquittal of the Morans by the jury.

Without LaGrand or Redd or another of AAA's tax planners, there was little possibility of an acquittal for Dr. Dehlinger. With Engelhard's sworn position that he would not allow his client LaGrand to testify, the emails he was sending to Dr. Dehlinger pretending that *not* having LaGrand testify was a sound "strategy," were nothing but a charade.

Ultimately, Engelhard worked to the benefit of LaGrand, enforcing her wishes to stay off the stand for her own benefit, but to the clear detriment of Dr. Dehlinger, who needed LaGrand's testimony that she did not believe the AAA approach to be illegal and neither did her clients, including Dr. Dehlinger.[9] The jury heard all about LaGrand the accountant and financial consultant and co-author of "21st Century Tax Strategies and Structures." The jury heard that LaGrand and Dr. Dehlinger had extensive communications during the time period for which Dr. Dehlinger was indicted. And it heard Dr. Dehlinger testify that he relied on LaGrand: "Q: Did you ask Tara LaGrand's opinion about the legality of the deductions? A: Yes. She assured me that the legality of all the plans that Anderson's Ark, were completely right and legal." (Tr. Vol. II, p.116). But the jury never heard from Redd, that he, too, had believed LaGrand, or from LaGrand herself, who had previously testified that her clients thought AAA's programs were legal. Engelhard ultimately chose one master, LaGrand, betraying the other, Dr. Dehlinger. Dr. Dehlinger was sentenced to 42 months. LaGrand received only 24 months.

The adverse effect of Engelhard's actual conflict of interest that caused him not to call LaGrand or Redd has been shown. Prejudice is presumed as a matter of law.

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9. The alternative to this assertion is that she lied to her clients. LaGrand either believed in the program she sold, or sold the program to fleece the sheep. Engelhard describes the dilemma of his client Tara LaGrand as a "catch-22". (App. 656).

CONCLUSION

Dr. Dehlinger's lead trial counsel had an actual conflict of interest that adversely affected his representation of Dr. Dehlinger. Dr. Dehlinger's conviction should have been reversed on the fully developed record on direct appeal before the Fourth Circuit Court of Appeals. This current position in the Fourth Circuit conflicts with the Second, Eighth, and Tenth Circuits. Because the Court of Appeals erred in its failure to do so, this Court should grant certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT DECIDED MARCH 5, 2010

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 09-4099

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ERIK DEHLINGER,

Defendant - Appellant.

Appeal from the United States District Court for the District of South Carolina, at Florence.
Terry L. Wooten, District Judge.
(4:06-cr-00900-TLW-1)

Argued: January 29, 2010 Decided: March 5, 2010

Before MOTZ, GREGORY, and DAVIS, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Appendix

PER CURIAM:

On August 22, 2006, Dr. Erik Dehlinger ("Dehlinger") was indicted in the United States District Court for the District of South Carolina on one count of conspiracy to defraud the United States in violation of 18 U.S.C. § 371 and three counts of willfully filing false income tax returns in violation of 26 U.S.C. § 7206. The matter proceeded to trial and a jury found Dehlinger not guilty on the conspiracy charge and guilty as to the three tax evasion charges. On January 29, 2009, Dehlinger was sentenced to 42 months imprisonment. He now appeals his conviction and sentence. We affirm.

I.

From 1997 to 2002, Dehlinger was an emergency room doctor at McLeod Hospital in Florence, South Carolina. In 1997 and 1998, Dehlinger engaged the services of Hoyt Wayne Terry ("Terry"), a certified public accountant, to prepare his income tax returns. In 1998, Terry calculated Dehlinger's adjusted gross income to be $ 301,091, with an income tax liability of $ 85,188, and self-employment taxes of $ 16,342. Dehlinger had previously paid $ 49,510 of his tax liability and therefore owed an additional $ 52,200 to the Internal Revenue Service ("IRS"). Unbeknownst to Terry, however, Dehlinger never filed this, or the previous year's, tax return. In neither of these years did Dehlinger report any financial information to Terry regarding a partnership or subchapter S corporation in which he had an interest.

Appendix

Dehlinger claimed that his good fortune in avoiding the above-described tax liability resulted from his introduction by his co-worker, Dr. Raghavan Chari, to the Anderson's Ark and Associates' ("AAA") programs. AAA purported to serve as a tax, retirement planning, and investment company based in Costa Rica. AAA sold audiotapes and books and conducted seminars, providing advice on how to, allegedly legally, avoid personal income tax liabilities. In March 1999, Dehlinger purchased an AAA audiotape series entitled "Gateway to Financial Freedom," delivered by Guardian Management, an AAA affiliate.

Following this initial purchase, Dehlinger used several other programs marketed by AAA, including both the "Look Back" and "Look Forward" series. AAA and Guardian Management designed "Look Back" to enable its users to both avoid tax liabilities for the current year and also to "recapture" taxes paid in the two years prior to usage of the program. Under the "Look Back" program, a user would create a partnership with an AAA affiliate such that the customer held a 95% interest and the AAA affiliate held the remaining five percent interest. AAA would arrange for an entity known as "La Maquina Blanca" to make a loan directly to the AAA affiliate minority partner, in exchange for the client's execution of a promissory note. The partnership would then use the loan funds to make a guaranteed payment to the AAA affiliate minority partner, allegedly for consulting and marketing services. In accordance with Section 707(c) of the Internal Revenue Code, a guaranteed payment to a partner for

the performance of services constitutes a deductible ordinary business expense on the partnership's tax returns. 26 U.S.C. § 707(c). Because the partnership created by AAA reported zero or at most minimal income, the guaranteed payment resulted in a net loss for the partnership, which would then pass through to each of the partners in proportion to their ownership interests. The partners could use the loss to avoid paying taxes for the current year and to "recapture" taxes paid for the two preceding years.

In contrast to the "Look Back" program, the "Look Forward" program sought to avoid *current* income tax liability. Under the plan, AAA created a limited liability corporation ("LLC") for each client. The partnership created through the "Look Back" program would provide consulting services to the LLC. The LLC would then make a "consulting fee" payment to the partnership's bank account, over which the client had sole control. Again, the losses would "pass-through" to the client, resulting in losses on his or her income tax returns.

In reality, neither of these programs operated as it was purported to operate. Baton Venture, the partnership AAA created for Dehlinger as a part of the "Look Back" program, allegedly received a loan from La Maquina Blanca of $ 650,000 in time to make a guaranteed payment in that amount to Mason Advertising, the AAA-created minority partner, by December 30, 1998. In fact, Dehlinger neither signed the promissory note nor paid the loan fees until March

1999, both prerequisites for the funding of the loan, according to the note. Rather, Dehlinger backdated his signature to December 20, 1998. In addition, Dehlinger never made a payment on the loan or granted the creditor a security interest even though he signed both the loan agreement and promissory note. Finally, despite claiming a partnership loss of $ 646,594 because of the guaranteed payment, there is no record of such a payment made to Mason Advertising.

All in all, the partnership losses translated to a negative $ 335,167 adjusted gross income for Dehlinger in 1998 and a refund of nearly $ 45,000 when computed by the Guardian Management Company. Dehlinger filed a Form 1045 in that year, prepared by George Benoit ("Benoit"), a Guardian Management employee. This return sought refunds of $ 34,135 and $ 34,442 for taxes paid in 1996 and 1997. Dehlinger filed this return rather than the one Terry had previously prepared. Dehlinger's 1999 Form 1040, also prepared by Benoit, reported an income of $ 240,164 from his medical practice. Again, however, Dehlinger reported no taxable income and no tax liability. On his 2000 Form 1040, Dehlinger again reported no taxable income and no tax liability. Dehlinger reported a partnership loss of $ 242,670 due to a $ 250,000 guaranteed payment to Mason Advertising, resulting in no tax liability despite an income from his medical practice of $ 240,164. In February 2002, Dehlinger used an AAA-affiliated CPA, Tara LaGrand ("LaGrand"), to prepare his 2001 tax returns. LaGrand also amended Dehlinger's 2000 tax return, using the "Look Back" program to recapture taxes already paid.

Appendix

On August 22, 2006, a grand jury sitting in the District of South Carolina returned a four-count indictment charging Dehlinger with one count of conspiracy to defraud the United States, in violation of 18 U.S.C. § 371, and three counts of making and subscribing a false return, in violation of 26 U.S.C. § 7206(1). Dehlinger pled not guilty on all counts.

At trial, Dehlinger testified on his own behalf, claiming that Dr. Chari had convinced him that the programs sold by AAA were legitimate means of avoiding income taxes. Dehlinger denied knowing that the various components of the program were illegitimate. He claimed that at the time he filed the returns, he did not believe that he was committing fraud by taking deductions related to the AAA programs. He also asserted that he relied on his tax return preparers and the AAA principals, including LaGrand, in filing the returns that reported zero tax due and owed.

Following a five-day jury trial, the jury convicted Dehlinger on three counts of making and subscribing a false return, and acquitted him on the conspiracy to defraud count. On January 7, 2009, the district court sentenced Dehlinger to 42 months' incarceration, to be followed by one year of supervised release. The court also ordered him to pay restitution of $ 363,207, a fine of $ 5,000, and a $ 300 special assessment.

II.

Dehlinger challenges his conviction principally on the ground of ineffective assistance of counsel, claiming that his attorney had a conflict of interest that impaired his representation of Dehlinger. Dehlinger also challenges the district court's (1) denial of his motion for a mistrial after a witness volunteered testimony previously ruled to be inadmissible hearsay; (2) admission of testimony from an undercover IRS agent regarding his experience with AAA programs; and (3) calculation of his base offense level and imposition of a sentencing guidelines enhancement for obstruction of justice. We address these issues in turn.

A.

Whether defendant's trial counsel had a conflict of interest presents a mixed question of law and fact, reviewed *de novo* by this court. *See Mickens v. Taylor*, 240 F.3d 348, 360 (4th Cir. 2001) (en banc), *aff'd*, 535 U.S. 162, 122 S. Ct. 1237, 152 L. Ed. 2d 291 (2002); *Williams v. French*, 146 F.3d 203, 212 (4th Cir. 1998).

This court considers ineffective assistance claims on direct appeal only if it "'conclusively appears' from the record that defense counsel did not provide effective representation." *United States v. Gastiaburo*, 16 F.3d 582, 590 (4th Cir. 1994) (citations omitted); *United States v. Baldovinos*, 434 F.3d 233, 239 (4th Cir. 2006); *United States v. Richardson*, 195 F.3d 192, 198 (4th Cir. 1999); *United States v. King*, 263 Fed. App'x 332, 333 (4th Cir. 2008). The reason for this restriction is that, generally,

a motion under 28 U.S.C. § 2255 in the district court is preferable than direct appeal, so that the parties may adequately develop the record. *Gastiaburo*, 16 F.3d at 590 (citations omitted); *United States v. King*, 119 F.3d 290, 295 (4th Cir. 1997).

The Supreme Court has held that criminal defendants have a Sixth Amendment right to conflict-free representation by counsel. *Cuyler v. Sullivan*, 446 U.S. 335, 345-50, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); *Holloway v. Arkansas*, 435 U.S. 475, 98 S. Ct. 1173, 55 L. Ed. 2d 426 (1978). A defendant seeking a new trial must show "'some real conflict of interest . . . resulting from [overlapping] representation [of two clients]'" to succeed on this Sixth Amendment claim. *United States v. Atkinson*, 565 F.2d 1283, 1284 (4th Cir. 1977) (quoting *United States v. Lovano*, 420 F.2d 769, 772 (2d Cir. 1970)). The mere fact of overlapping representation is insufficient to create a Sixth Amendment violation. *See id.* Rather, a defendant must establish that (1) his attorney labored under "an actual conflict of interest" that (2) "adversely affected his lawyer's performance." *Sullivan*, 446 U.S. at 348; *Strickland v. Washington*, 466 U.S. 668, 691-92, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *United States v. Stitt*, 552 F.3d 345, 350 (4th Cir. 2008), *cert. denied*, 130 S. Ct. 65, 175 L. Ed. 2d 48 (2009); *United States v. Tatum*, 943 F.2d 370, 375 (4th Cir. 1991).

Dehlinger claims that his attorney, Scott Engelhard, Esq. ("Engelhard") had a conflict that arose from the latter's representation of him, LaGrand (the AAA-affiliated CPA who prepared his 2001 tax returns and

amended his 2000 tax returns), and Collis Redd ("Redd"), an AAA tax planner. According to Dehlinger, Engelhard refused to call LaGrand as a witness during his trial, even though LaGrand could have offered exculpatory evidence, because Engelhard's loyalties were divided between the two clients.[1]

Here, although Dehlinger raises more than a colorable claim that Engelhard's loyalties were impermissibly divided, a review of the record shows that the facts are not conclusive. It is not for this court to determine the character, duration, and extent of Engelhard's representation of Dehlinger, LaGrand, and Redd, in the first instance, and whether his representation of these individuals created actual conflict that adversely affected his representation of Dehlinger. Indeed, we decline to comment on these issues. Although, at Dehlinger's insistence, the district court conducted limited, non-evidentiary post-verdict proceedings to examine Dehlinger's allegations against Englehard, we agree with the court's conclusion that the facts and circumstances presented by this record should be evaluated by a district judge acting on an adequate factual record in an orderly post-conviction proceeding rather than on the basis of dueling affidavits

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1. According to Dehlinger, LaGrand could have testified that her clients, Dehlinger included, believed that AAA's tax strategies were legal. Ostensibly, LaGrand's testimony would have contradicted the government's evidence of Dehlinger's willful violation of the tax laws. Dehlinger further argues that LaGrand's testimony previously exculpated defendants in related and similar prosecutions in other federal districts.

and declarations. Accordingly, we hold that Dehlinger has not "conclusively" established the existence of an actual conflict of interest that adversely affected Engelhard's representation of Dehlinger.[2]

B.

We review a district court's refusal to grant a mistrial for abuse of discretion. *United States v. West*, 877 F.2d 281, 287-88 (4th Cir. 1989). An abuse of discretion is found "only under the most extraordinary of circumstances" and requires that a defendant have experienced prejudice. *United States v. Dorlouis*, 107 F.3d 248, 257 (4th Cir. 1997). A defendant cannot prove prejudice if a jury "could make individual guilt determinations by . . . appraising the independent evidence against each defendant," but rather this court must find that there is a "reasonable possibility" that the error influenced the jury's verdict. *United States v. Porter*, 821 F.2d 968, 972 (4th Cir. 1987); *United States v. Seeright*, 978 F.2d 842, 849 (4th Cir. 1992). A district court can generally prevent prejudice to a defendant by "a cautionary or limiting instruction, particularly if the danger of prejudice is slight in view of the overwhelming evidence of guilt." *United States v. Ham*, 998 F.2d 1247, 1254 (4th Cir. 1993) (quoting *United States v. Masters*, 622 F.2d 83, 87 (4th Cir. 1980); *see also United States v. Johnson*, 610 F.2d 194, 196-97 (4th Cir. 1979) ("The general rule is that if evidence which may

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2. In light of our holding, we deny Dehlinger's motion to file a supplemental brief.

have been taken in the course of a trial be withdrawn from the consideration of the jury by the direction of the presiding judge, that such direction cures any error which may have been committed by its introduction.").

Here, the district court did not abuse its discretion in denying Dehlinger's motion for a mistrial after William Cauthen, Jr. ("Cauthen") offered testimony that the court had previously deemed inadmissible and subsequently ordered stricken. The district court had ruled that Cauthen could not characterize anything on the AAA website as "right wing or fringe." In response to the prosecutor's inquiry of his "impression of the information that [he] saw on the AAA website," however, Cauthen stated that he "thought the information that I saw there was sort of fringe material, right wing material, and that potentially it could be fraud." Upon Dehlinger's objection and motion for a mistrial, the district court ordered the statement stricken from the record. The district court refused to grant a mistrial. During final instructions the district court reminded the jury that "if any evidence was stricken from the record, [they] should not consider that evidence in making [their] decision."

Cauthen's statement was one line in a four-day trial replete with evidence establishing Dehlinger's guilt, including signed fraudulent tax returns. The district court quickly ordered the statement stricken and, before deliberations, reminded the jury not to consider such evidence. *See United States v. Harris*, 165 F.3d 1062, 1066 (6th Cir. 1999) (affirming the district court's denial

of a motion for mistrial after a brief reference to a prior arrest where "the district court gave an immediate and clear limiting instruction"); *Black v. Shultz*, 530 F.3d 702, 707 (8th Cir. 2008) (affirming the district court's refusal to grant a mistrial given the fact that the court "gave a curative instruction" after a single statement was made in violation of the court's order). And although Dehlinger claims before us that the statement was devastating to his defense, he does not state how the statement made about the AAA website prejudiced him or what impact it likely had on the jury's determination of his guilt. *See United States v. Baumgarten*, 517 F.2d 1020, 1030 (8th Cir. 1975) (denying defendant's motion for a mistrial where witness' brief reference to defendant's previous arrest was "of very little significance"); *United States v. Butler*, 71 F.3d 243, 255 (7th Cir. 1995) (holding that a prosecutor's lone comment did not warrant a mistrial as it "was a single, isolated, indirect remark").

C.

The decision whether to admit evidence is properly within a district court's discretion; thus, we review a district court's admission of evidence for abuse of discretion. *United States v. Hodge*, 354 F.3d 305, 312 (4th Cir. 2004); *United States v. Lancaster*, 96 F.3d 734, 744 (4th Cir. 1996). A district court abuses its discretion "only when it can be said that [it] acted arbitrarily or irrationally in admitting evidence," something that occurs only under "the most extraordinary of circumstances." *United States v. Williams*, 445 F.3d 724,

732 (4th Cir. 2006) (citing *United States v. Simpson*, 910 F.2d 154, 157 (4th Cir. 1990)); *see also United States v. Heater*, 63 F.3d 311, 325 (4th Cir. 1995) ("[I]n order to find a district court's error harmless, we need only be able to say 'with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error.'") (quoting *United States v. Nyman*, 649 F.2d 208, 211-12 (4th Cir. 1980)).

1.

Fed. R. Evid. 701 allows lay witnesses to express opinions that are "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and not based on scientific, technical, or other specialized knowledge within the scope of [expert testimony]." In addition, courts have held that lay testimony generally requires that the opinion offered be "the product of reasoning processes familiar to the average person." *See United States v. Garcia*, 413 F.3d 201, 215 (2d. Cir. 2005); *United States v. Cooks*, 589 F.3d 173, 180 (5th Cir. 2009).

Dehlinger argues that the district court impermissibly allowed lay witnesses to offer "expert testimony" designed to show that he possessed a guilty state of mind during his interactions with AAA. At trial, the district court permitted Cauthen to offer testimony about the AAA website. As just discussed, however, the court ordered testimony characterizing the website as

"fringe," stricken from the record and instructed the jury to disregard it. The court also permitted Special Agent Mike Preiss, who conducted an undercover investigation into the operation of AAA, to testify about investors' relationships with AAA, specifically focusing on Dehlinger. In permitting such testimony, the court reasoned that the testimony would "provide some evidence for the jury to consider in terms of what actually went on at [AAA] and what the process was." As a witness, Preiss compared the partnership documents AAA sent him while he was undercover with those that Dehlinger had obtained from AAA and testified to his understanding of how the AAA programs worked, and specifically, that he was to receive about $ 300,000 in tax savings. Preiss also noted the existence of similar statements about tax benefits in an executive summary AAA sent to Dehlinger. Preiss further discussed and compared plan documents that he had received from AAA with those Dehlinger had in his possession. To his knowledge, Preiss indicated that the partnerships and companies created by AAA conducted no business of their own, as indicated in their income tax returns which listed no gross income or receipts and included only minimal expenditures, other than the guaranteed payment at issue. And even though the partnership agreement explicitly set out the various responsibilities of each partner to the agreement, the partners never performed any of these duties. Priess testified that, based on his experience with AAA, he was not obligated to repay the loan for which he had cosigned and that was subsequently used to fund the guaranteed payment to his AAA-affiliated partner.

Dehlinger claims that Cauthen's and Preiss's testimony amounted to impermissible expert testimony because their statements demonstrate that Dehlinger knew the information on the AAA website was illegitimate and that Dehlinger had the same guilty state of mind as Preiss did during his interactions with AAA, respectively. This argument fails. The testimony at issue in this case is not, in either purpose or effect, that of an expert. Both witnesses merely offered their opinion of their individual experiences with AAA, making deductions and drawing inferences that an "average person" would similarly be capable of in an identical situation. Neither Cauthen nor Priess testified about Dehlinger's mental state or whether he knowingly violated the tax laws. Cauthen limited his statements only to his personal impressions of the AAA website, which were later stricken, as previously discussed. Preiss's testimony was restricted to his own knowledge of, and experience with, AAA. He offered his personal impressions of AAA and the similarities inherent in the documents AAA provided to him and those Dehlinger received. He did not, as Dehlinger would have us believe, proffer testimony suggesting that Dehlinger himself possessed a felonious intent. He never testified or even hinted that, because he believed AAA's programs were illegal, Dehlinger must have believed they were illegal as well. In short, neither Cauthen nor Priess testified to the ultimate issue of Dehlinger's willfulness as an expert witness would have.

2.

Where admission of lay testimony is challenged as bordering on expert opinion, testimony that has no direct effect upon proof of the elements of the substantive offenses charged, will not be overturned, particularly if there is sufficient evidence elsewhere in the record upon which the jury could have found the defendant guilty. *See* Fed. R. Crim. P. 52(b)).

Dehlinger was found guilty of three counts of willfully filing false income tax returns. One of the elements proved by the government was that Dehlinger voluntarily and intentionally violated a known legal duty. *Cheek v. United States*, 498 U.S. 192, 201, 111 S. Ct. 604, 112 L. Ed. 2d 617 (1991). Even discounting Priess's testimony, there was sufficient evidence of willfulness. For instance, the government presented evidence that, in 1998, Dehlinger had accurate Form 1040s prepared by Terry. Dehlinger, however, did not file this form or inform Terry that this form was incorrect. Rather, Dehlinger signed and filed a tax return that claimed a refund of all taxes paid to a AAA partner. This evidence shows that Dehlinger knowingly filed fraudulent tax returns. *See United States v. Mohney*, 949 F.2d 1397, 1407 (6th Cir. 1991) ("A taxpayer's signature on a return does not in itself prove his knowledge of the contents, but knowledge may be inferred from the signature along with the surrounding facts and circumstances, and the signature is prima facie evidence that the signer knows the contents of the return.") (citing *United States v. Harper*, 458 F.2d 891, 894 (7th Cir. 1971)); *United States*

v. Drape, 668 F.2d 22, 26 (1st Cir. 1982) (holding that a defendant's signature is sufficient to establish knowledge once it has been shown that the return was false). The district court did not abuse its discretion in refusing to grant a mistrial.

D.

We review a district court's interpretation of the Sentencing Guidelines *de novo* and its factual findings for clear error. *United States v. Osborne*, 514 F.3d 377, 387 (4th Cir. 2008), *cert. denied*, 128 S. Ct. 2525, 171 L. Ed. 2d 805 (2008); *United States v. Daughtrey*, 874 F.2d 213, 217-18 (4th Cir. 1989). If a defendant fails to raise a timely objection during sentencing, however, we review the district court's actions for plain error. *See United States v. Olano*, 507 U.S. 725, 731-32, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993); *United States v. Uzenski*, 434 F.3d 690, 711 (4th Cir. 2006); *United States v. Lynn*, Nos. 08-5125, 08-5126, 08-5132, 09-4341, 592 F.3d 572, 2010 WL 322176 (4th Cir. Jan. 28, 2010).

Dehlinger claims that the district court improperly sentenced him when it (1) took into account three years of tax losses for which he was not indicted or convicted and (2) increased his offense level by two levels for obstruction of justice. As to the former issue, the district court properly took into account three years of tax losses for which Dehlinger was not indicted in calculating his base offense level. When an offense involves tax evasion or filing fraudulent tax returns, the Sentencing Guidelines calculates a defendant' s base offense level

on the attempted tax loss, defined as "the total amount of loss that was the object of the offense." U.S.S.G. § 2T1.1(c)(1); *United States v. Delfino*, 510 F.3d 468, 472 (4th Cir. 2007). Tax loss is loss attributable to the offense of conviction and any other loss due to relevant conduct, including "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense," U.S.S.G. § 1B1.3(a)(1), and all such acts and omissions that were part of the same course of conduct or common scheme or plan as the offense of conviction, U.S.S.G. § 1B1.3(a)(2). "[A]ll conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated." U.S.S.G. § 2T1.1 comment (n.2); *United States v. Ervasti*, 201 F.3d 1029, 1042 (8th Cir. 2000).

Here, the presentence investigation report recommended a tax loss of $ 363,207, which included tax loss for the six-year period from 1996 to 2001. During sentencing, Dehlinger did not object to the very inclusion of tax losses from 1996, 1997, and 1998. Rather, Dehlinger objected to the inclusion of those tax losses only to the extent that they did not reflect deductions to which he may have been entitled. The district court did not err in overruling Dehlinger's objection and including tax losses from 1996 to 1998 because it was shown at trial that Dehlinger used the same AAA programs and made

the same types of deductions in those three years as the subsequent three years for which he was indicted and convicted. *See Ervasti*, 201 F.3d at 1042 (using "fraud loss," which defendant conceded to be $ 5,747,478.88, rather than "tax loss," to which she did not "ascribe a precise value," as the basis for calculating the base offense level in a mail fraud case in which the defendant misappropriated impounded tax monies from clients of their payroll processing corporation); *see also United States v. Hayes*, 322 F.3d 792, 801-02 (4th Cir. 2003) (vacating a sentence because the district court did not consider all relevant evidence in determining the applicable tax loss).

As to the second of Dehlinger's sentencing issues, the district court did not err in increasing Dehlinger's offense level by two levels for obstruction of justice. The Sentencing Guidelines allow a two level increase if "the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice with respect to the investigation, prosecution, or sentencing of the instant offense of conviction and any relevant conduct." U.S.S.G. § 3C1.1; *United States v. Puckett*, 61 F.3d 1092, 1095 (4th Cir. 1995). Obstruction of justice includes committing perjury at trial. U.S.S.G. § 3C1.1, comment (n.4(b)). A district court applying an enhancement based on obstruction of justice must necessarily find, by a preponderance of the evidence, that the defendant (1) gave false testimony, (2) concerning a material matter, (3) with the willful intent to deceive while under oath. *United States v. Dunnigan*, 507 U.S. 87, 92-98, 113 S. Ct. 1111, 122 L.

Ed. 2d 445 (1993); *United States v. Sun*, 278 F.3d 302, 314 (4th Cir. 2002) (citing *United States v. Smith*, 62 F.3d 641, 646 (4th Cir. 1995)).

The district court found that Dehlinger committed perjury when he testified (extensively) under oath that he relied on others, taking advice from his accountant and financial planner, as well as Dr. Chari, regarding the legality and soundness of the AAA programs. Specifically, Dehlinger claimed that he took certain deductions "because Richard Marks and George Benoit said they were appropriate deductions." Tr. 108. As an initial matter, the district court's enhancement for perjury did not constitute double counting (even though Dehlinger's crime constituted lying to the IRS) because the crime for which he was convicted was completed by the time he went on trial. Indeed, his crime was complete after he had filed the fraudulent tax returns. Lying under oath constitutes a new and different circumstance designed to hide the already completed crime. In short, the conduct underlying Dehlinger's conviction is different from the conduct upon which the district court based its enhancement.

Second, the district court properly reasoned that, since the jury found Dehlinger guilty of all tax evasion charges, it must have rejected all of his testimony regarding good faith and lack of willfulness. During sentencing, the district court discussed at length its reasons for enhancing Dehlinger's sentence; namely, that Dehlinger (1) gave false testimony, (2) concerning

a material matter, (3) with the willful intent to deceive while under oath. The district court said,

> [Defendant's] testimony was to say, if it is detrimental reliance, if that is the description, the proper description, it may well be; but it was more specific about what was going on, what I did and, gosh, I really did not know that this was not on the up and up. And it seems that the jury evaluated that testimony and the jury found the defendant guilty and ignored that testimony altogether. . . .
>
> But [defendant] was very specific about what he had done and the fact that it was not bad motive or criminal intent by him; but the specifics were such that, it seems to me, there was a rejection of those facts. . . . But the testimony was detailed and specific about what happened; and he asked the jury to rely on his position that he did not know what was up in light of a lot of evidence that indicated that he knew some of the things that were going on simply were not legal, and ultimately the jury concluded they were criminal.

Sent. Tr. 34-38. These observations by the district court support its determination that Dehlinger committed perjury for the sole purpose of deceiving the jury regarding his culpability and involvement with AAA. The district court therefore properly sentenced Dehlinger.

III.

For the foregoing reasons, we affirm Dehlinger's conviction and sentence, without prejudice to any post conviction claim based on ineffective assistance of counsel that appellant may elect to pursue.

AFFIRMED